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CONGRESSIONAL CONTINUITY: ENSURING THE FIRST
BRANCH IS PREPARED IN TIMES OF CRISIS

Wednesday, April 6, 2022

House of Representatives,

Select Committee on the Modernization of Congress,

Washington, D.C.

The committee met, pursuant to call, at 9:00 a.m., in Room 1334, Longworth House Office Building, Hon. Derek Kilmer [chairman of the committee] presiding.

Present: Representatives Kilmer, Cleaver, Perlmutter, Phillips, Williams, Timmons, Davis, Latta, and Van Duyne.

Also Present: Representatives Scanlon and Loudermilk.

The Chairman. Okay. The committee will come to order.

Without objection, the chair is authorized to declare a recess of the committee at any time.

And, without objection, I would also like to welcome our colleagues from the Committee on Rules and the Committee on House Administration to participate in this hearing.

The topics we are focusing on today fall within their jurisdiction, so we wanted to make sure to include them in this discussion. Their participation in the hearing will be limited to the Q&A portion of the hearing.

I now recognize myself for 5 minutes for an opening statement.

One of the least surprising things we will hear today is that no one wants to imagine a future that doesn't involve them. It is why less than half of American adults have a will. And it makes total sense. There is a natural tendency to procrastinate when it comes to planning for anything that is remotely unpleasant, much less catastrophic. It is pretty easy for most people to ignore the consequences of doing nothing when the chances of disaster seem unlikely.

But what about institutions, how do they assess risk and plan for worst-case scenarios? As it turns out, there are a lot of people -- the institutions are a lot like people, meaning, they are all over the place. That is true whether we are talking about governments or businesses or schools or other organizations.

State government continuity plans range from detailed to sparse, according to the National Conference of State Legislatures, and foreign legislators are just as inconsistent. Big companies are more likely to have business continuity plans in place compared to medium and small companies, but they vary a lot in terms of their depth and scope. And

as we have seen over the past couple of years, continuity of education very much depends on the school and the district.

The 9/11 attacks did spur a broad movement toward continuity planning, and our recent experience with COVID has reportedly had a similar effect. That is a good thing. The less time institutions devote to reacting, the more time they can spend doing what they are supposed to do.

For Congress, that means working on behalf of the American people. The attacks on 9/11 made clear how vulnerable this institution is. The possibility of a Congress without a Capitol and without its Members is obviously something none of us want to contemplate. But as representatives of the people, we need to. Our essential responsibility is to make sure that the people's voice remains intact no matter the circumstances.

Figuring out how to do that is no easy task, as the experts joining us today well know. Some were involved in the post-9/11 debates around continuity of Congress and will share with us their firsthand perspectives on why this incredibly important issue is so tricky to address.

Our most recent experience with COVID is a reminder that there is still much work to be done. Congress has learned a lot about continuity of operations in the past 2 years, just as it did on the heels of 9/11. And while we all want nothing more than to move on and put the pandemic behind us, Congress should take advantage of this unique moment. Because if we don't, Members will be sitting around 20 years from now, trying to make sense of what happened and why, just like a lot of us are doing today with regard to 9/11. That is a disservice to the American people.

The bottom line is that if Congress can't function, our constituents lose their voice in government. That is a core principle of representational democracy that should be

preserved. A Congress that can't function also opens the door to unilateral executive branch control which defies constitutional intent.

So today is about restarting that conversation. The experts joining us will provide background and perspective on the measures Congress adopted after 9/11 to ensure continuity of representation. They will also discuss the current effectiveness of those measures and whether they think additional steps need to be taken or adjustments made. I am looking forward to a good discussion.

The committee will once again make use of our committee rules that give us the flexibility to engage in extended discussion in the civil exchange of ideas and opinions. In accordance with clause 2(j) of House rule XI, we will allow up to 30 minutes of extended questioning per witness. And, without objection, time will not be strictly segregated between the witnesses which will allow for extended back-and-forth exchanges between members and the witnesses.

Vice Chair Timmons and I will manage the time to ensure that every member has equal opportunity to participate. Any member who wishes to speak should just signal their request to me or Vice Chair Timmons.

Additionally, members who wish to claim their individual 5 minutes to question each witness pursuant to clause 2(j)(2) of rule XI will be permitted to do so following the period of extended questioning.

Okay. I would like to now invite Vice Chair Timmons to share some opening remarks as well.

[The statement of Chairman Kilmer follows:]

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Mr. Timmons. Thank you, Mr. Chairman.

First, I just want to say thank you all for coming today. This is a very, very complicated issue, and we are going to spend some time digging in on it.

I am going to begin by just talking about this committee. We try to make Congress better. We try to modernize Congress. That is our mission, more effective, efficient, and transparent for the American people.

We start with what is the problem, and then we try to figure out a way to solve the problem. Let's take staffing, for example. We have made a number of recommendations there. I think the biggest ones are decoupling Member pay to allow us to pay our senior staffers more and increasing the MRA to give Members more resources to compensate staff better, keep them here longer. A number of other recommendations.

We have made a lot of progress, we can keep going, but that is the model. So let's start with, what is the problem? The problem is, after 9/11, we dug deep and tried to figure out what we would do in a worst-case scenario.

The way I see it is there is two types of problems. One, there is policy issues. Does anybody think it is a good idea that if enough members in the majority party were to meet an untimely demise, that a motion to vacate the chair could switch the balance of power, have a new Speaker for 100 to 150 days? That is just a policy question. I don't think that is -- that is not the way it should be, but that is the way it currently is. So we got to start with what is the problem. So that is the policy.

Then we have procedural -- potential procedural legal challenges to continuity of Congress. So worst-case scenario, designated survivor kind of situation. We have all seen the show. You have the designated survivor off, and he is getting sworn in as Acting

President. You got 30 Members of Congress who are sitting here, saying, well, we are going to elect a Speaker. That new Speaker then is going to say, I am the President, and the designated survivor is going to say, Well, are you? Like, you had 30 Members of Congress elect you Speaker. That is not a quorum. So then they are going to say, well, let's go to the Supreme Court. Ooh, there is no Supreme Court. What do we do?

So that is just a problem. And I am really looking forward to figure out whether we agree that is a problem, whether that is actually what would happen, or if we need to make recommendations to change it to address that.

So I am looking forward to this hearing. I really appreciate you all being here.

And, with that, Mr. Chairman, I yield back.

[The statement of Mr. Timmons follows:]

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The Chairman. Thank you, Vice Chair Timmons.

I am honored to welcome four experts who are here to share with us their experiences, perspectives, and ideas for how to ensure congressional continuity in the event of a catastrophe or emergency. We also have a couple of others who aren't going to have opening remarks but are going to be available to also share their wisdom with us.

Witnesses are reminded that your written statements will be made part of the record.

Our first witness is George Rogers. Mr. Rogers spent 14 years working for the U.S. House and U.S. Senate. He served as general counsel to the House Committee on Rules and as counsel at the House Oversight and Government Reform Committee. He began his public service career working for former Senate Foreign Relations Committee Chairman Richard Lugar.

Mr. Rogers, thank you for being with us. You are now recognized for 5 minutes.

STATEMENTS OF GEORGE ROGERS, FORMER GENERAL COUNSEL FOR THE HOUSE RULES COMMITTEE; AND DOUG LEWIS, FORMER ELECTION CENTER EXECUTIVE DIRECTOR

STATEMENT OF GEORGE ROGERS

Mr. Rogers. Thank you, Mr. Chairman.

Chairman Kilmer, Vice Chair Timmons, and members of the committee, and my distinguished fellow panel members, it is an honor to appear before you here today.

I was privileged, as you said, to serve as the general counsel for the Rules Committee right after the 9/11 terrorism. It was a time of self-examination when the words "homeland security" took on a whole new meaning.

At the time, I was assigned three major projects to assist Members. First, to create the Committee on Homeland Security; second, to look at our rules and procedures for continuity; and third, to help enact the expedited uniform special elections bill.

I would like to also point out how delighted I am to be working with such prestigious people on this panel, and I am referring specifically to the distinguished Madam Secretary Shalala. Even though we are probably on different sides of this issue, we both don't view it as partisan.

And I would also like to note that the President of the United States gave her the Medal of Freedom, a well-deserved honor, and thank you.

I will be brief as my written testimony contains details. The 9/11 attack focused the minds of House Members on continuity. Continuity in Representation Act and the provisional quorum rule work in tandem to ensure only elected Members of the House exercise power in the people's House. The members followed the father of the

Constitution, James Madison's, view that where elections end, tyranny begins.

First, they provided a mechanism for Members killed by terrorism or catastrophe to be replenished by uniform special elections. Uniformity is important, and I think today we will probably end up talking about the number of days and all those sort of things. But it needs to be uniform so you can avoid the Sturm und Drang of multiple elections occurring at multiple times, as Mr. Timmons mentioned, back-and-forth power shifts. That kind of turmoil is something the House needs to avoid. The people of America don't need to have that happen.

Second, the principals decided to address what is called the quorum trap, what to do if a majority of Members are unable to act because of incapacitation. The problem is that if you are elected, sworn, living, and incapacitated, you are still part of the denominator for the quorum, and you can quickly figure out that there are problems there if you can't get a quorum.

The rule creates a multistep process to allow action by those Members able to respond. In that sense, it is an objective way of going about the issue. The Cox-Frost task force and the committee that I worked for both looked at how to define incapacitation, but instead we came up with a rule. If Members can respond, that is how you define the quorum.

The 103rd Congress also held a hearing and floor action on a constitutional amendment, which I am sure we will talk about today. The distinguished Americans on this panel have long believed in a constitutional amendment. We considered a constitutional amendment in the Congress. Two-thirds affirmative vote was required. Sixty-three Members voted for it.

In contrast, the Continuity in Representation Act was considered over two Congresses. In the 108th Congress, it passed with 306 votes. In the 109th -- excuse me --

yes, in the 109th Congress, it passed with 329 votes. Became Public Law 10955 and was codified into United States Code, Section 8.

At no time in history of the Republic has the House been appointed -- not in the Constitutional Convention when the issue was decided 9-2, not during the pandemic commonly known as the Spanish flu, not during wars that threaten the survival of our Nation, and not during a nuclear attack threat during the Cold War -- to not have uniform special elections risks special elections called at different times for potential partisan gain.

And then there is the matter of former Governor Blagojevich who tried to sell a Senate seat.

On the provisional quorum rule, it utilizes constitutional rulemaking powers recognized by the Supreme Court. The rule focuses on the abilities of Members themselves to respond to multiple-day quorum calls as well as reports that include input from the Sergeant at Arms, the Clerk, the Attending Physician to Congress, public health officials, and law enforcement.

I would note that the then-minority objected primarily to the lack of concurrence of the minority in effectuating the provisional quorum. There are very few, if any, powers of concurrence in the House rules.

In closing, the Congress provided for a uniform expedited special elections and prevented the quorum trap. One question not answered is what to do if all the Members are killed or incapacitated.

Rather than appointments, you could consider elected continuity officers for each State, who would then serve until uniform expedited special elections occur. I have some more thoughts on that if we get into it in the questions.

Were a constitutional amendment done, it would take years for the people's House to have its provisions go into effect, and the people's House needs to be able to act

immediately. So another question that is left unanswered is, what do we do while we are waiting for the constitutional amendment to go into effect?

I welcome your questions. And, again, I thank the select committee for inviting me here and for this important inquiry. Thank you.

[The statement of Mr. Rogers follows:]

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The Chairman. Thank you, Mr. Rogers.

I saw Mr. Lewis on the screen, but I don't see him now. I don't know if he just has his camera off. Oh, I saw -- ooh, there we go. Terrific.

So I will now introduce our next witness, Doug Lewis, who is joining us virtually from Texas. Mr. Lewis is the former executive director of the National Association of Elected Officials, a national nonpartisan, nonprofit organization that represents the Nation's voter registration and elections officials and administrators at the city, township, county, and State levels.

Mr. Lewis, thanks for being with us. You are now recognized for 5 minutes.

STATEMENT OF DOUG LEWIS

Mr. Lewis. Thank you, sir.

I want to first say that I am impressed with what you all are doing in terms of looking at these issues. You have done considerable work so far, and it looks to me like you are headed in the right direction of trying to find out what to do. I am very appreciative of the work you are doing.

At the same time, I want to say to you that we looked at it from a standpoint of an election, how do we conduct an election in an emergency situation, what can we do to speed the process and to have the process have validity.

And the first question that we have to ask in any of that is, what do we consider an election to be? If it is just an event, if all it is is that we are going to decide that there is a date certain we are going to have an event, and that event is a bunch of people show up and they vote on a piece of paper, and we get -- we get some results from that.

Or is it a process in the sense that we have come to expect in elections throughout the Nation's history that we will have a time to get to know the candidates, and we have a process by which candidates can get on the ballot, and that we then have a time in which we let a primary process work and determine who is going to win that primary? And from that, then we have a general election, and we learn something about the candidates and their positions and what have you.

And so if we are talking about a democracy process, if we are talking about an election as a process that makes this happen all over, then we are talking about something that is a whole lot slower than just doing an event.

And so the questions that have to come, whether we do a 49-day dive -- deadline

or longer or shorter, the question really comes, do we have enough time for a primary process to work and for all the things that go on before a primary, including filing deadlines and whatever? Do we have -- do we allow political parties to choose their candidates ahead of time so that we can then run an accelerated election? What about independent candidates at that point, and how would they choose their nominees? Are we prepared for a situation like in California when they ran that special governor recall? Are we prepared for 50 or 100 candidates to file for the office that is now open due to an emergency?

There has to be some process in here that allows us time to do ballot preparation, to do notification, to do all the things that we have come to expect from what we expect an election to be. In the most extreme instance of this, with nothing going wrong, we can accomplish most of that within 7 to 10 days.

There also has to be time for voters to find out who is officially on the ballot and where they go to vote on that ballot when that time comes.

We have some emergency concerns and considerations. Is transportation available? Do we have electricity? Are there ways for us to distribute ballots and set up polling places and have people come in, or are we going to be forced to only hold it in the daylight hour? If we don't have electricity, how do we create ballots for you?

Now, certainly we can run one without electricity. We can run one without even, maybe, gasoline. If we don't have electricity, we probably can't have gasoline. And so we can do that, but it means it is going to be entirely different than we have ever done before, at least in recent decades. And so the concept of how we do this and the question of whether or not we can do this depends upon the circumstances that are in front of us when we do this.

And so staffing an election is going to be difficult in a national emergency

situation. Now, we have learned from experience that if we are running -- if we are running those specialized elections for vacancies that occur as a special election, we can run that pretty much with our staff and with the key volunteers that we have always relied upon. And so we can -- we can make that work, but it means we also then probably are going to shrink enormously the numbers of polling places that we have gotten used to. We are going to have to look at a way that we can make all of that work for the voters and have locations that they can find, and then probably pay not a bit of attention to the traditional lines to do that. And so it is a complex situation.

I want you to know that elections officials will do what they have to do to make this come off, but we really have to have you all decide what is the larger context of what is an election and how do we get there.

[The statement of Mr. Lewis follows:]

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The Chairman. Thank you, Mr. Lewis.

Our next two witnesses are the co-chairs of the AEI Continuity of Government Commission. I am going to introduce them both and allow them to present their testimony together.

Donna Shalala is the University of Miami Board of Trustees presidential chair and professor emerita in the university's Department of Health Management and Policy. From 2019 to 2021, she served as a Member of the U.S. House of Representatives, representing Florida's 27th District. Previously, Congresswoman Shalala served as the president of the Clinton Foundation and the University of Miami and as the 18th United States Secretary of Health and Human Services throughout the Clinton administration.

A.B. Culvahouse most recently served as the United States Ambassador to Australia, from 2019 to January 2021. He previously served as the chair of the international law firm, O'Melveny & Myers, LLP -- did I get it? Close enough for jazz -- and as White House Counsel during the last 2 years of the Reagan administration.

Both President Donald Trump and the late Senator John McCain tapped Ambassador Culvahouse to vet their Vice Presidential candidates.

I don't know if I call you Congresswoman, Secretary, President Shalala, Donna, and Ambassador Culvahouse, you are both recognized for 5 minutes, 10 minutes combined. Take it away.

STATEMENTS OF THE HONORABLE ARTHUR B. CULVAHOUSE, ON BEHALF OF CONTINUITY OF GOVERNMENT COMMISSION; AND THE HONORABLE DONNA SHALALA, ON BEHALF OF CONTINUITY OF GOVERNMENT COMMISSION; THE HONORABLE BRIAN BAIRD, ON BEHALF OF CONTINUITY OF GOVERNMENT COMMISSION; AND THE

**HONORABLE MIKE BISHOP, ON BEHALF OF CONTINUITY OF GOVERNMENT
COMMISSION**

STATEMENT OF THE HONORABLE ARTHUR B. CULVAHOUSE

Mr. Culvahouse. Mr. Chairman, Ranking Member Timmons, members of the committee, thank you for having us today. I will summarize my prepared statement. I am joined with -- we are joined with two other members of our commission, Brian Baird, and I think Mike Bishop is online, who are former members of this body.

I will quickly identify what the problem -- or the principal problem, as we see it, and I think Secretary Shalala will talk about our recommended solutions.

Mr. Chairman, members of the committee, I first visited the issue of continuity of government in 1987 as the brand-new White House counsel and received a very sobering briefing on what helicopter I was supposed to be on in the event of the proverbial bolt out of the blue.

Since then, I have served on two different Nuclear Command and Control Department of the Defense Advisory Commissions, doing a deep dive, again, of the survivability of the executive branch governance and of our Nuclear Command and Control System in the event of catastrophic attack.

As stated in my prepared statement, we have extensive and elaborate procedures, laws, and constitutional provisions to assure that we always have a President. Now, that President may not be the elected President or even the elected Vice President. But our enemies, foreign and domestic, can be assured that we will always have a President to exercise those responsibilities.

Our commission and the commission before us, and many other experts have

concluded that the same is not true of Congress, that under certain cataclysmic, catastrophic scenarios, you could resolve in not having a functioning House of Representatives. That by definition is a fault line and a fissure that requires attention.

The Constitution is clear in Article I, Section 5 that a majority of each House shall constitute a quorum, if not a majority of Members then living. And in the case of the House of Representatives, as you know better than I, vacancies can only be filled by special election, the result being that it is abundantly clear in our mind -- and we have spent a lot of time studying this -- if more than 218 Members die or are incapacitated in a mass attack, the House could not convene, could not make laws, could not pass appropriations, could not override a veto, could not impeach a rogue President, which -- and could not confirm a Vice President or otherwise check and balance the executives in a situation of great peril. And that is the problem that we respectfully suggest most requires the attention of this committee.

My prepared statement identifies three other issues of, I guess, lesser gravity, we would say, one of which is that it would be helpful and beneficial and wise for the authority of the House in clear situations to meet virtually and remotely. I don't -- we are not purporting to get involved in the debate of the day, but we can probably all envision of scenarios where meeting remotely or virtually and voting remotely would be wise.

Third, the third issue relates to the requirement on January 3 that Congress assemble, elect a Speaker, adopt rules, and then on Presidential election years, on January 6, elect to count electoral ballots. There are no provisions for alternative ways to accomplish those important tasks in the event of catastrophic events and people cannot assemble as required.

And then fourth, the Constitution does not provide for replacement of severely incapacitated House or Senate Members, and you can see, again, in a catastrophic

scenario where you would have living Members but who could not assemble and -- for quorum purposes. And, again, you would have the potential for a House that cannot -- does not have a quorum and, therefore, cannot function.

Mr. Chairman, members of the committee, in all four of these scenarios, and most especially the first, relating to the lack of a constitutional quorum by mass casualties, they threaten the continuity of Congress as a functioning representative of the American people, and our commission respectfully suggests that they need to be addressed.

[The statement of Mr. Culvahouse follows:]

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STATEMENT OF THE HONORABLE DONNA SHALALA

Ms. Shalala. Thank you very much. Thank you, Mr. Chairman. Thank you, Mr. Rogers.

Chairman Kilmer, Vice Chairman Timmons, let me address the exact recommendations. First, the problem that Congress cannot meet. The Commission, we actually didn't comment on the actions taken during the recent pandemic, but we noted that there could be some disaster in the future where everyone would agree it is impossible to meet in person for an extended period of time.

To ensure that Congress could function during this crisis, we recommend a constitutional amendment that would give Congress the power by law to provide for the scenario, including the possibility of remote participation. However, this constitutional amendment would provide protections to ensure that remote floor proceedings would require the in-person or virtual presence of at least one-half of each body to meet the quorum requirement, and that Members would be provided notice and be guaranteed access to whatever mode of meeting that is envisioned in law.

We also make a recommendation to address the problem of incapacitated Members. In the extreme case, when the numbers of deceased and incapacitated Members exceed a majority of either Chamber, temporary replacements will replace the incapacitated Member. But any Member deemed incapacitated shall immediately be reinstated if they declare that they are able.

We make a recommendation for the start of Congress. The House and the Senate shall each have the power to provide for the commencement of business at the start of a new Congress, and that power would include provision for each Chamber to remotely swear in new Members and commence the business of a new Congress.

And then we make a recommendation for a change to House rules. We recommend that the repeal of parts of a House rule that currently exists. In 2005, House rule XX, clause 5, was amended to include emergency procedures under which the quorum of the House may be reduced potentially to a very small number if only a few Members of Congress remain alive and are able after a catastrophic attack.

The rule's stated aim was to allow the House to operate under almost any circumstance. We believe that this rule is both unconstitutional and unwise.

Finally, on the method of selecting temporary replacements, we recommended that temporary replacements be drawn from a list provided by each sitting Member. Using this method, the temporary replacements would most resemble the representatives who lost their lives in the catastrophe and would not shift the balance of power in Congress.

That is a summary of our recommendations. We obviously have more. I sat on the original commission, and I think it is important for all of you to consider these recommendations, but more importantly, to consider what happens and how the problem of mass vacancies ought to be managed. And it is a decision that ought to be made quickly, because the possibility is certainly in front of us.

When I was a young assistant secretary at HUD in the Carter administration, I was the designee to manage the Department in case of a catastrophe. And I remember flying in the middle of the night in a rainstorm to a bunker to manage the Department of HUD. It was actually terrifying, and we weren't very well organized.

These kind of catastrophes, as we now know, are now very much in the future, and in the near future, we simply have to make these decisions.

Thank you very much.

[The statement of Ms. Shalala follows:]

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The Chairman. Thank you, Congresswoman Shalala and Ambassador Culvahouse.

Before we move to a period of extended questioning, I also want to just welcome two additional members of the AEI Continuity of Government Commission who are joining us today, two former members. Brian Baird, who represented Washington's Third District in the U.S. House from 1999 to 2011; and Mike Bishop, who is with us virtually, who represented Michigan's Eighth District in the U.S. House from 2015 to 2019.

Congressman Baird and Congressman Bishop will be joining the Q&A portion of the hearing, so let's kick that off.

I now recognize myself and Vice Chair Timmons to begin a period of extended questioning of the witnesses.

Any member who wishes to speak should just signal their request to either me or Vice Chair Timmons. You can raise a hand, or if you are joining us virtually, you just raise your virtual hand, and we will be sure to call on you. And if someone mentions something that you want to pull on that thread, just give us the hi sign, and we are happy to jump in.

I want to start with our two guests that didn't get a chance to chat. I have a thousand questions, but let me start with you all, and I am going to ask you to keep it reasonably brief. But I am just curious why you got involved in this effort.

Mr. Bishop, if you want to start, I thought your story of how you jumped into this was very compelling, and if you can briefly just share with us how you got involved in this effort.

Mr. Bishop. Certainly. Thank you, Mr. Chairman and Ranking Member Timmons, members of the committee. It is an honor for me to be here today. I am grateful for your time on this matter.

Well, I am a late addition to this commission, to answer your question, and having had a personal experience while serving in Congress, that really piqued my awareness and certainly my sense of responsibility to be a part of an immediate solution, which I think is to address an imminent threat to our democracy.

I was on the baseball field with my Republican teammates and colleagues back in 2016 when a lone assassin opened fire on us with a semiautomatic rifle. As you know, the shooter seriously wounded our good friend, Steve Scalise, and several others, and but for the heroic acts to defend us, there is no question in my mind that the assailant very well could have taken out all of us.

At the time, it was a -- you know, for us, it was a personal matter. It was a matter of life and death. But it didn't take long to soon realize that this had far greater implications than just a human catastrophe. And in retrospect, I can't believe it took this event to make me realize, to make us realize the implications of what a planned attack on Members could mean to the institution of democracy.

But there is no question that we are all vulnerable, and this is just one illustration of the very grim realization that today we face a substantial number of ridiculously imminent threats to democracy. And a catastrophic event is just around the corner every day, and it can subvert the constitutional powers of Congress.

We live in a very dangerous world, and it is more and more every day. The growing threats of foreign adversaries, terrorism, extremism, both foreign and domestic, and as you mentioned earlier, natural disasters are now -- you know, we understand the implications of -- the dramatic implications of a global pandemic.

Now more than ever, the threats exist that pose a threat to our country, and it is conceivable -- it is at a time, which scares me the most, at a time of our greatest time of crisis, without a legitimate democratic government and no ability whatsoever to respond

to a real existential crisis or threat.

And we are -- we are all on notice. We have a real problem on our hands, and we can't afford to ignore it any longer. And it is not -- it is not difficult to conceive of a single event, planned or otherwise, that would instantly render democracy powerless. And we have dodged a bullet in the past, so to speak, but who knows when our luck will run out.

So to answer your question, in summary, Mr. Chairman, the reason why I got involved in this commission is because I feel compelled to be a part of the solution of an imminent threat to our democracy and really the future of our country and every American citizen.

I really wish I was in Congress right now because I would -- I would really want to do whatever I could to exercise every power I had in my office, leverage every resource of my office to take up this matter with a sense of urgency.

So thank you very much for allowing me to be here today. I am happy to answer any questions you might have. And I am grateful for your attention to this matter and for being a part of what you are doing today.

The Chairman. Congressman Baird, do you want to just briefly share your --

Mr. Baird. Thank you, Mr. Chairman, Mr. Vice Chair, members of the committee. It is good to see my good friend, Mike Bishop, here. And thank you, Mike, for your thoughts, and thanks to the other panelists today for theirs.

You asked how I became involved with this. On September 11th, when we saw the second tower get hit, I had a window on the seventh floor of Longworth House Office Building. We overlooked the Pentagon and national airport. And I asked my staff to come into the room. I said, look, if they hit D.C. -- or if they hit New York, they are probably going to hit D.C. I would do it if I were them. And I said, we can see -- we can see the airport. We will be the first people to see what might happen, and it is our

obligation to warn people if it does. And we planned what would happen if we saw something.

I went back to my office. Less than 5 minutes later, the event happened. We saw the fireball emerge from the Pentagon, and we executed a plan in which the male members of my staff ran floor to floor to floor telling everybody, you got to get out of this building, another plane could be coming easily, because we just saw something.

But as I ran through the building, in a surreal moment, I said, what happens if they kill us? What happens to this institution? What are we going to do? So my first order of business, get my staff out of the building, get other people's staff out of the building. Got home, took some preparatory measures.

And then all night I spent the time trying to read the Constitution, read the House rules, et cetera. And I have been doing this for 20 years now -- for 20 years -- trying to say, we are not prepared. And we still aren't.

And let me just bring it to this moment today. It is appropriate that we are here today on April 6, and the reason that is appropriate is one of the central issues at stake here is what constitutes a quorum.

It happens that April 6 was when the first Senate and House convened. They tried to convene on March 4. They tried to convene on March 5. They couldn't do it, and they couldn't do it because they lacked the quorum.

They didn't say, we are going to lower the provisional Member of the House to chosen, sworn, living, and present. They said, we don't have half the people here, we can't meet legitimately. And they waited till April 6, the same day we are here today. So when we talk about losing the legitimacy of a quorum, it is a real deal.

On top of that, there is this question of, must we always have procedures in place now that we have had forever, and will those continue to work? The short answer is that

this commission and the prior commission studied this in great detail. And by the way, both commissions did not start -- neither commission started and said, what we really must do is amend the Constitution. They all said, as Vice Chair Timmons pointed out, what is the problem stated.

And Vice Chairman Timmons, you hit the nail on the head, as did the chairman. We have not only got the issue is the quorum valid, but we have got an issue of legitimacy.

If the balance of power changes, and as Mr. Bishop pointed out, by a significant number that you now have a different majority than the people elected through either happenstance, a train wreck, as the Republican Conference experienced on their way to their retreat a while back, a plane wreck, as Mr. Kilmer knows, oftentimes that westbound flight has the entire Washington delegation on it.

One of the issues of legitimacy in a representative government is do you have a representative? Is someone there to uphold your interest? And if your delegation has been eliminated, the legitimacy of representative government is lost.

So when we -- I will summarize and close with this. When we first started this, it was all about catastrophic losses. More recent events have convinced me that we have to look at the legitimacy of the institution. And if your State has no Senators or no Representatives at a time of national crisis, you are not part of that representative government. We need to fix that.

This commission has recommended, as did the prior commission, a mechanism that is elegant, efficient, would obviate concerns about the quorum, would obviate the concerns that Mr. Lewis pointed out earlier about how fast can we hold an election, would make sure that every person in every district in every State has representation.

And last but not least is this vision: Imagine a scenario, a horrible scenario, in

which the Capitol gets hit during the State of the Union or the inauguration. We have lost the President and Vice President. We know the scenario. We have lost the House and the Senate and, by the way, the Supreme Court. What do we do?

The provisions this commission has recommended would allow this body, the House and the Senate -- if the Senate takes comparable action at some point -- to reconvene 24 hours after the most abusive and destructive strike in the history of the country. Twenty-four hours later, the Congress of the United States, Article I, is back and functioning with credible people chosen by the last person elected to represent the people. And they get back to business.

It is a powerful message to our people and to our adversaries and to the free world, which would look to us at that time of chaos and say, my God, what happens now? We have an answer if we enact the proposal recommended by this committee.

Thanks for letting me speak.

The Chairman. Thanks very much.

I am going to put a hold on my other 999 questions and kick it to Vice Chair Timmons.

Mr. Timmons. Thank you, Mr. Chairman.

So, again, what are the problems? We got policy problems and we got legal problems. The policy problems are, do we think it is appropriate if a certain number of members of the majority were to meet an untimely demise, that there is a motion to vacate the chair, and balance of power shifts for 100 to 150 days? That is just a policy problem. The world is going to go on.

The next is if, worst-case scenario, State of the Union attack, 30 Members of the House elect a Speaker. That Speaker becomes Acting President. That is a policy problem. There is a legal problem surrounding it, but that is a policy problem. We probably don't

think that is a good idea.

But the legal challenge is this: If the Speaker that is elected by 30 Members of Congress tries to become Acting President, and the designated survivor of the opposing party says uh-uh, and then they say that you don't have a quorum, or you have the impeachment question, and the Acting President -- the designated survivor says there is no quorum. So that is a legal question which would create a crisis in government if this quorum issue isn't settled.

So I guess the question is, for true continuity of Congress, continuity of government -- and I am going to ask Mr. Rogers this -- if on April 26, when we come back, we have a quorum call, and keep in mind there is only 433 Members currently serving in Congress -- two passed away -- and 217 Members of Congress, press the present button, is that a quorum?

Mr. Rogers. No [inaudible].

Mr. Timmons. Okay. So 217 out of the 433, which is less than half of 435, would constitute a quorum because two Members have passed away, and we are going off 433?

Mr. Rogers. Well, if the Speaker [inaudible].

Mr. Timmons. Okay. Mr. Culvahouse, what do you think about that question?

Mr. Culvahouse. No.

Mr. Timmons. Secretary Shalala?

Mr. Baird? Congressman Baird? No? Okay.

Mr. Baird. No.

Mr. Timmons. So can we get an answer? How do we answer this question absent the constitutional amendment which will take forever? Is there a way to answer this question? Because really that is the question. If we can get an answer to that question, everything else is just a policy issue. It is not a continuity of Congress issue.

So is there any way that we could get an answer, I guess from the Supreme Court, as to whether 217 Members of a 433-Member body constitutes a quorum?

Yes, Congressman Baird.

Mr. Baird. Mr. Chairman, I respect the line of questioning. I think it is important. The current rule takes it to a much different level than what you are asserting. And as you said earlier, the current rule would allow three Members or two Members, that is the rule of the House.

It is impossible to imagine that the Framers of the Constitution intended that a House rule could allow three Members out of 435 to declare themselves a Congress, elect one of the Members as Speaker, and then deem that Speaker the President of the United States under the --

Mr. Timmons. But, Congressman, we literally could do this on April 26.

Mr. Baird. What is that?

Mr. Timmons. We could -- 217 people could vote President and -- I mean, that could happen. And is there any way that we would then be able to get an answer to this question?

Mr. Baird. You could -- you could --

Mr. Timmons. Mr. Rogers?

Mr. Rogers. If I understood your hypothetical, two Members have passed away?

Mr. Timmons. Two Members have passed away, so there is 433 Members. 217 is less -- was less than half of 435, so it is half.

Mr. Rogers. Clause 6 of rule XX, when those two Members passed away, the Speaker takes cognition of that, the whole number of the House drops from 435 to 433. You have 217 Members who --

Mr. Timmons. Sure. Could you make an opposite argument to that? If you were

advising the designated survivor in the worst-case scenario, and the incoming Speaker of the House was in the opposing party, and you really thought it was -- I mean, you could make the opposing argument, I would imagine.

Mr. Rogers. [Inaudible.]

Mr. Timmons. And you would if you were advising the designated survivor against the incoming Speaker.

Anyways, so I just want to throw out the idea of, if there is a way we can get this question answered, where the four of you agree -- go ahead. Yes, sir?

Mr. Rogers. [Inaudible] you go on down a list. Actually it is something the committee would look at. I believe the Secretary of the Committee on Homeland Security, who obviously has visibility into things when we are in a time of crisis, is below, I believe, the Secretary of Agriculture. You know --

Mr. Timmons. Sure.

Mr. Rogers. [Inaudible] so the answer right now would be a question of law that the elected Speaker --

The Chairman. Sorry. Can you make sure your mike is on? Sorry.

Mr. Rogers. My apologies. I am a rookie at testifying. So I --

Mr. Timmons. But, again, the designated survivor would be the Acting President until the rump Congress, the 30 Members create a new Speaker. That Speaker would, under the 25th Amendment, go in above them, and then you have chaos.

Anyways, I think we get the quorum question, and if we can get an answer to that question somehow, it will resolve the legal issues, not the policy issues.

Last question really quick. Mr. Rogers, could the House adopt a rule limiting the ability for a motion to vacate the chair for a limited time under limited circumstances?

Mr. Rogers. Well, we used to say at the Rules Committee that if you have a

majority, you can do just about anything.

Mr. Timmons. But could the majority -- but could the majority limit the minority's ability under -- if the majority no longer has a majority because people passed away, could the majority limit for 150 days the minority's ability to do a motion to vacate the chair through the House rules?

Mr. Rogers. Well, you would have to pass the rule. So you would have to have a majority of those Members present to vote for it.

The question of electing the Speaker is in the Constitution. So the question would be, are you violating the Constitution in some way by postponing the vacate? But the Constitution is -- must elect a Speaker. It doesn't talk about vacate. So I think under your hypothetical, it is possible you could do that.

Mr. Timmons. Thank you, Mr. Chairman. Sorry for taking so long.

The Chairman. All right. I have got Mr. Latta, then Mr. Loudermilk, then Mr. Phillips, then Mr. Perlmutter.

Mr. Perlmutter. I have just a comment on this --

The Chairman. Go ahead.

Mr. Perlmutter. -- conversation. Because I think I want to help Mr. Rogers here. The way it would work -- and this sort of ties Mr. Baird and Mr. Rogers together. The way it works is, so, for instance, I was in the chair. I said, based on the deaths, and we have got three other people out, that the number of the whole House is 430. This is what I said Friday, okay? And so then that is the base number. But then what happens -- and so that -- you work off of that number, except now we have had the catastrophe, and the catastrophe changes that number because everybody's gone or a certain number are gone.

So it isn't like -- so then you go to the rule that we have in place as to how do you

deal with a catastrophe. So it isn't, the 217 isn't legal or not legal or constitutional. It is what happens once the crisis hits, changes the number from what the whole House number was, 430, now it is 30.

Mr. Timmons. But the three of them disagree with whether 217 Members constitute a quorum on April -- look -- 200- --

Mr. Perlmutter. I am with Mr. Rogers on this one.

Mr. Timmons. Okay. But I am just saying, I mean, yeah, I get -- that is the problem, people disagree.

Mr. Latta. Well, thanks very much. And I want to thank our witnesses for being here.

And of all of the committee hearings that we have been having on the Modernization of Congress, I think this is the most serious, because, again, it really goes to the fabric of our Constitution and of this House. And so I think when we have these discussions today, it is really important to take in a lot of things into consideration, especially what our Founders wanted and how that Constitution has lasted for this many years.

And, Mr. Rogers, I know in your written statement, you know, you go back to the Constitution Convention 1787, and I am a historian by training, and it is what I read all the time. And I think that, you know, a couple of the quotes that you have in here, especially with Madison -- and, again, Madison was one of the most prepared person that ever went to probably the Constitutional Convention. Where elections end, tyranny begins.

And you also quote Mason. The people will be represented. They ought, therefore, to choose their representatives.

I think, you know, again, they went through, in a 4-month period of time, for those that stuck it out in Rhode Island, that never even showed up, that they went back and

forth to give us what we have today. And I think that, you know, the Founders really gave us something that we have to make sure we preserve.

But I think -- you know, I would like to get your thoughts on a couple of things to start with, Mr. Rogers, because, again, when you talk about, you know, the War of 1812, on August 20, 1814, when Admiral Cockburn stood upon the Speaker's chair of the House of Representatives and said, Shall this harbor of Yankee democracy be burned? He led his troops all said aye, and they set fire to the Capitol.

But, you know, it was right after that, then, did our Congress, you know, just end up not coming back to Washington? No, they went to the Blodgett Hotel and met.

And not long after that, in 1815 to 1819 when they built the old brick Capitol, you know, we met. It wasn't that they said, we were going to, you know, have to have a different forum.

And then, you know, you also go in -- and I am just going to talk for a couple of seconds more, but, you know, when you look at the Civil War, when you had the southern States leave the Union, and then in 1864, in July, when General Early and the Confederate troops attacked Washington, and Abraham Lincoln went out and actually saw the attack, you know, we didn't see, you know, Washington flee.

But I would just like to get your thoughts on, you know, what our Founders were looking at at that time.

Mr. Rogers. Well, thank you, Mr. Latta. Yeah, my written testimony goes into it more. I thought it was very interesting, you had a Federalist, the father of the Constitution, Mr. Madison, and an anti-Federalist, who -- Mr. Mason, and they agreed, elections. Got to have elections.

And it was thoroughly debated. There were -- it came up several times in the Committee of the Whole, and then it came up for the final vote, which I mentioned went

9-2 with one State divided.

So about 16 percent of those voting at the time -- or States voting at the time wanted to have appointments, and 75 percent wanted to keep elections.

I think we are in a, you know, an inflection point in our history with all of the -- the current pandemic, the violence, all of the other things that are going on. But we have to also look back to the time in which the Founders and each successive group of Members sitting in this great House, they faced some pretty existential threats too.

I am 53. I remember having to shelter under my desk for allegedly what would be good for a nuclear war attack, which I don't think would have helped at all. But in each time that the Congress has faced challenges, they have enshrined the elections. And the people I worked for at the time -- Mr. Dreier, Mr. Sensenbrenner, and the House leadership -- they wanted to make sure that we had elections. These are mechanisms.

Constitutional amendment, it has some interesting points to it, but it would take time. What would we do in the interim? I think the average time of adopting a constitutional amendment is a fair number of years. So you are still going to have to come up with something to do even if you were to adopt the constitutional amendment.

But the Founders didn't want appointments, and they certainly -- you know, at no point did Madison talk about the politically connected picking their successors. In fact, he talked about, he wanted, you know, the wise and the foolish, he wanted the discerning and the undiscerning -- the full quote is in my written testimony -- because the House has to represent the people.

The great compromise was the Senate is going to represent the States, and the House has to represent the national will, and the way you get there is elections.

Thank you.

Mr. Latta. Let me ask, Mr. Lewis, if you could have your mike on there. You know,

you go through in your testimony really looking at -- on the vacancies and also talking really about how you would be fulfilled and at the local level. But, you know, you go through from transportation, to cars running, electricity, to ballot stock being available, you know, how -- you know, do we even have a mail service.

And, you know, some points that, you know, if you are thinking about what could happen out there, not just for the people that have to put on the elections locally, but also what could happen here -- let's just say something would happen that, well, you know, Washington's obliterated.

Again, where would Congress meet? Do we have to have another place in the country that we would meet? Again, what about telecommunications? You know, I am the ranker on Energy and Commerce's Telecommunications Subcommittee, and we can't even get our own -- you know, when we have virtual hearings a lot of times, we can't get our mikes to work. And so the question is, you know, would people be fairly represented there?

What if roads, what if bridges, what if all the bridges that would cross the Mississippi to Missouri, and Mike up in Michigan, you know, what happens if the bridge is destroyed, that you can't get from the upper to the lower part of Michigan?

That, you know, if we have a situation that air travel is stopped, if we had an electromagnetic pulse that would prevent things.

But, you know, Mr. Lewis, you know, in your testimony, you know, you talk about all these things. Could you conduct -- could you conduct an election in a situation like that, to try to then say, this is how we are going to get people in? And how would you also have fairness if one part of the country could actually do an election but the other part couldn't?

Mr. Lewis. Well, of course, your last question is one that is a policy question that I

think you guys as policymakers are going to have to answer.

But from our standpoint, are you asking if we can conduct an election? Well, one, I guess that presupposes that society is in such a condition that some of it works, some parts of it work, even if all of it doesn't work.

We can adapt to pretty much anything that is thrown at us, I think. We may not be able to do it on the timetable that some folks have asked, because elections officials are going to be just like the general public. If there is no way for us to get around, if there is no way for us to have communications, it is going to be very tough for us to do the job.

Now, having said that, remember that America, during the time of the Founders, as you all are talking about, was a very rural society and very far apart, and people would travel for days by horse or mule to get in to the local polling place and, in many instances, vote by hand.

If we got to that point, we can duplicate that, we can replicate that. Hopefully, that is not the situation. But I think in our case, as elections administrators, what we have to plan on is the worst possible scenario and then work up from that as to how we do anything else.

And so the answer is, even if we don't have electricity, we can probably still have an election. But it will be very different from the kind that we have had before, and participation by wide segments of the populous are going to be more difficult.

RPTR MARTIN

EDTR ROSEN

[9:59 a.m.]

Mr. Latta. All right. I thank you very much for your answer.

Mr. Chairman, just indulge me for one last --

This is from the National Journal from March the 17th, the first paragraph:
Ukrainian lawmakers still showing up to vote. As fighting intensified around the suburbs of Ukraine's capital of Kyiv, entire neighborhoods reduced to rubble, over 300 of the country's parliamentarians gathered in the city to vote.

I yield back.

The Chairman. I want to give Mr. Baird a chance to swing at that first question, but first can I -- Mr. Lewis, I couldn't tell from your written testimony how fast you could actually do -- like barring the electromagnetic pulse and the roads all caving in and all of that, if everything is fine, how fast can -- you know, in your testimony it referenced 75 days. The law says, I think, 49 days. What -- if everything is hunky-dory, you still have to get nominees, you still have to print ballots, you still have to make sure military voters get their ballots.

Can you ballpark a number with all of the caveats set aside?

Mr. Lewis. Realistically, what I think we have said before and what we have said consistently, the closer you get us to 60 days or more --

The Chairman. 60 days.

Mr. Lewis. -- you then have an election that looks like an election and what most people in America would interpret as an election because you have got enough time to talk about it and find out how to get your candidates and that sort of thing.

At the same time, even that -- for instance, let me take just one little piece, ballot

stock. Ballot stock is very specialized. It is not just plain paper. It is something we number so that we can account for all of it. On a short-note basis, we are unlikely to be able to produce enough ballot stock. So what we would have to do is do a workaround and do plain paper, but that is so difficult to then prove that it wasn't manipulated. You just sort of have to accept some things as you go through this.

The Chairman. Gotcha. Thank you.

Mr. Baird, do you want to quickly just reference? And then I am going to call on Mr. Phillips because I know he has got to go to another committee, and then I will go back to Mr. Loudermilk.

Thank you for your flexibility.

Mr. Baird. Thanks, Mr. Chairman.

A couple of things. One, I have submitted extensive written testimony, and I would encourage the committee to review that. Also I'll be responding to Mr. Lewis's testimony.

But I want to address something -- I am sorry he is not here, but Mr. Latta raised. The quote actually -- first of all, we all agree that under normal circumstances elections are the way to choose your Representative. We all agree to that. But if you can't have an election because it is unsafe to do so, or because it takes too long, it is also important to still have representation as important decisions are made.

So the question is not either elections or no elections. Nobody on this committee is saying do away with elections. We are saying have a replacement temporarily until such time as elections can be held, as, Mr. Lewis points out.

With regard to the Madison quote, history is important. The quote as cited is not correct. The actual quote was not when elections end, tyranny begins. It was when annual elections begin.

Madison -- we don't know if it was Madison or Hamilton. At least Wikipedia says it was Madison. The Library of Congress says it could be Madison or Hamilton. But here is the point: Madison was arguing in that phrase about should we have annual elections, biennial elections, et cetera. And he actually said, Isn't it interesting how Proverbs-like when annual elections end, tyranny begins could get used out of context, which they are in this case.

Now, a couple of other quick points. Look, it is not fair to say, or accurate to say that the Framers only accepted elections, direct elections as valid means of representation. The United States Senate, for 125 years, was not directly elected. The Framers accepted that. Beyond that, the 17th Amendment which vested the power to choose Senators in the hands of the people still allowed non-direct replacement via Governors, which I think is unwise and we ought to change. But there are plenty of precedents in our own history, including the existence of the Senate itself.

One other thing, Mr. Timmons is from South Carolina. Your State actually has enacted a very similar provision to that which the Commission is recommending. The National Council of State Legislatures has reviewed extensively succession provisions in the State legislatures, and you will find that a number of actually fairly conservative States have language almost identical to what we have got; that upon the election of a Representative in the State, the Representative shall choose a list of successors. In the event of significant losses, from that list the replacements will be made.

That exists in South Carolina as a matter of fact. So if we are saying that only elections are valid for representation or you have tyranny, then the United States Senate is a tyrannical organization -- sometimes we feel that way, I know -- and we are also saying the State legislatures are tyrannical. It is just not a fair and valid comparison.

The Chairman. Go ahead, Mr. Phillips, and then I have got you, Mr. Loudermilk.

Mr. Phillips. Thank you, Mr. Chairman.

This hearing is a great reminder that we overindulge in retrospect in this institution and not nearly enough in prospect, and I am grateful for this.

You know, in my estimation, continuity requires both people, place, and process, and we are appropriately focusing on people, but particularly Members. But I do want to call attention to the fact that this place would not operate without extraordinary staff and house officers, parliamentarians, et cetera.

Also process, you know, let's say we did proceed with selective replacements based on current Members. I know how hard it is in my second term to understand how this place operates. I cannot imagine being a new delegate going to a place where you are completely unaware of process or parliamentary procedure.

And also place, you know, where would we retreat to? Would it be military base perhaps?

So I would just ask that maybe we spend a few moments -- I would like to hear all of your thoughts on this subject. How micro should we get? How detailed should a plan be relative particularly to process, explanation of rules, how a Congress would communicate if it is no longer in Washington, assuming Washington is non-inhabitable, for example, and also, again, the support teams that make this place operate.

Maybe, Mr. Baird, if you want to start.

Mr. Baird. Thank you.

You are exactly right. In my own testimony, written testimony, we have to find a way to have continuity of staff.

I would also just quickly say part of the advantage of Member-designated replacements is you will get a lot of people in that replacement position who have already served in Congress. In my case I would select former Congressman Don Bonker. He was

two predecessors away, same party, centrist Democrat, knows the district inside and out, super smart. You would have me, I am dead. Sorry. But you have somebody just as good as me and who understands the institution. Not everybody would be chosen that way. But you would have a critical mass. And if you pair that with some continuity of staff and, as you said, with procedures allowing for remote meeting if the circumstances demanded, you can reconstitute this body in 24 hours.

Mr. Culvahouse. I agree. It needs to be micro, and if you look at the -- as I indicated, I served on two Department of Defense Nuclear Command and Control Advisory Committees, and I also served on the President's Foreign Intelligence Advisory Board.

On the executive side, the planning is elaborate. It is micro. It is very detailed. As I -- when I met previously informally with the chairman and the ranking member, I indicated -- and it's really all I can say -- I can say I served as an exercise president once, and I was very impressed on the executive side at the level of detail. When you turn to the rest of the government, not so much, not so much.

And I do think, in addition to fixing this quorum problem, which I firmly believe and every lawyer that serves on our committee agrees that is a serious problem, I would encourage you to consider extensive planning. I mean, we worried about the bolt on the blue. When I was in the Reagan White House, I was in the second helicopter. I don't think I would have made it probably, but all we cared was that the President got out and the Vice President. But I do think we need to have a resilient government. That is a matter of deterrence. It is a matter of deterrence, and we have Mr. Putin not disclaiming nuclear weapons, and so we are back to where we were in 1987, I am afraid to say, and work needs to be done.

Ms. Shalala. I agree with my colleagues. The problem that we are having trouble

with is how do you get replacements, because the election people tell us it will take too long to set up an election. That is a technology problem. That is an investment problem. And States have solved this problem. Oregon does it by sending out ballots. I mean, there are ways of dealing with the technology problem with investments.

None of us believe that we should have anything other than elected Representatives, and that anything we do should be temporary to pull the government together, but we also don't want to change the mix that the people elected. We don't want to shift from one party to another just because a certain party lost more Members.

So overlying all of this was our desire to keep the political mix, which made it more complicated, obviously. But we really believe in elected Representatives. Temporary replacements, it seems to me, we can deal with, and we can certainly deal with the technology and the difficulty of a quicker election with more representation.

Mr. Phillips. I wholeheartedly agree.

You know, my concern is, even with great people, without a knowledge of process, any institutional memory, place, any of that -- without that predetermined and somewhat prepared for, I am afraid even the best mechanism by which we replace people still might not be satisfactory.

Ms. Shalala. Well, most of the -- I mean, Brian identified who he would have replaced.

Mr. Phillips. Yeah.

Ms. Shalala. Most of us would have replaced someone with legislative experience of some kind or another. I mean, I don't think it took me that long to figure out the process.

Mr. Phillips. And that is part of my question, is should we have maybe some standards by which these, you know, successor --

Ms. Shalala. We certainly could do some orientation. We certainly could do some quick orientation.

Mr. Phillips. And maybe pre-orientation, you know, prospective orientation.

Ms. Shalala. Yes, there is no question about that. But those are all the details.

And, finally, I want to comment on the organization of the government. The agencies have detailed plans that they exercise. They go through exercises all the time.

Mr. Rogers. Thank you for the question.

When I was at the Rules Committee and we were dealing with the continuity, we participated in annuity exercises. We went to a remote location. We had procedures. The rules, the precedents, and everything were backed up on very hard and mirrored sites that are located far away from Washington, D.C.

So I think perhaps the Select Committee could do some inquiry and see where those things are at now. That was 17 years ago when we did those sort of exercises and processes.

I certainly agree the need for staff -- of course, the original Congress didn't really have staff. I think they had a clerk. And as a staffer, I understand that role and agree with it.

A couple of other quick points. You know, it might be that the immediate area of this building or the Capitol is damaged, destroyed, whatever. But they did put as a consequence of the Cox-Frost Task Force the ability of the Speaker to convene in another place within the seat of government. The seat of government is kind of an interesting term they chose. I don't know, Walter Reed Hospital might be seat of government, or someplace else. And certainly, I think Mr. Latta mentioned that they moved to the hotel when they had to during 1812. But I think you could be pretty generous about where you moved the seat of government to. Of course it involves transportation issues and other

things, but --

Ms. Shalala. Go back to Philadelphia.

Mr. Rogers. Go back to Philadelphia.

A couple of other points. One, you could have a situation with a lot of Members incapacitated but able to vote, They just couldn't come and do it on the floor. So the committee might want to look at something like the Sergeant at Arms being sent out to canvass the vote, you know, some sort of certification. Let's say, God forbid, that a bunch of people are in Walter Reed because of some horrible event, but they are still -- you know, incapacitation doesn't necessarily mean coma. I think that is what they thought of in 2004 or 2005, but you could have something like that, so some sort of canvassing by an official agent of the House.

And then the last point is I have put together some thoughts about what happens if all of the Members are killed or all are incapacitated, and it kind of draws on the constitutional amendment idea but without changing the elected nature of the House.

What it would be, if I can just briefly mention it, is, so, the House chooses its officers. You elect the Clerk. The Clerk presides over the House until the new Members are sworn in and the rules are adopted. The Speaker, as everyone knows, doesn't have to be a Member of Congress but has the ability to vote.

So drawing kind of on those two principles, an idea that a person some of you may know, long service to the House, Billy Pitts, he was staff director of the Rules Committee, he was a minority officer of the House, and several other things for Bob Michel. He and I kicked around some ideas, and the idea in brief would be that the States could elect two continuity officers each. They don't come to Washington -- I mean, they come to Washington for orientation and training and all the things you correctly point out, but they stay out in the States. They are the continuity officers that are duly elected by the

people. Each Congress, the Congress could decide, because it has the power of deciding who actually gets seated, so you could also have a vote on opening day: This slate of people created by all the States are our continuity officers. Two could be from different parties, same party, but allow each State to decide. And then what you have there is officers who could come and could act in the stead of Members, could vote, could do other things.

I still -- I mean, I immensely respect the work of the Commission and the people here. I still have a really hard time with the idea that -- and I have a hard time based on what I have read of the Constitution and the Federal Conventions and whatnot, the idea that you are elected to the House and take the oath and, therefore, you are a Member, and then you have somehow sort of a property interest that you could convey to someone else, which is sort of the idea of I have in my back pocket my successor.

Some people talk about a durable power of attorney or some other mechanisms, but that to me is not how our Nation was founded. That sounds a lot more like aristocracy.

But thank you.

Mr. Phillips. Thank you, sir.

I yield back now. Thank you.

The Chairman. Mr. Loudermilk.

Mr. Loudermilk. Thank you, Mr. Chair, Mr. Ranking Member, for allowing non committee members to participate in this. This is very intriguing and something I would like to follow this process even further.

But as a member of House Administration, we are invited to come in and listen because this is somewhat dealing with elections. And this isn't the direction of the questions I was going to give, but something Mr. Phillips brought up prompted a

question.

Especially when it comes to a temporary solution, I look at the idea of having a designee, designated-successor type thing. I can also see several problems with that, that that becomes a political tool for the next election when you decide to leave that this is: I was already selected by so and so. Therefore, I have got an endorsement. I could also see a situation where that puts additional stress on a Member because there will be campaigns to become that designated person, right?

But I have got one fundamental question, because I am intrigued, that as I try to do quite often, this committee is going back and looking at the original intent of the Constitution. And I think, inevitably, if we come up with a solution, it has to be consistent with that original intent or this whole thing gets caught up in questions in -- you know, throughout the future with Supreme Court and everyone else.

So real quick question. Mr. Rogers, maybe you are the one to answer this. The Constitution clearly says that the House of Representatives shall be composed of Members chosen every second year by the people of the several States. So that is election.

Would a temporary replacement constitutionally even have the authority to act as a Member of Congress under the Constitution because they were not selected by the people of the State?

Mr. Rogers. That is an excellent question, Mr. Loudermilk.

And, again, not to keep going back to this idea, but the idea of continuity officers that we came up with in preparation of the hearing is they would be elected in the States, so they would have some imprimatur of the election.

Mr. Loudermilk. Okay. And someone else have a -- oh, yeah.

Mr. Culvahouse. Congressman, I mean, the answer is no, but we are proposing a

constitutional amendment.

Mr. Loudermilk. Okay.

Mr. Culvahouse. So the constitutional amendment would empower that successor, just like the temporary appointments on the Senate side.

Mr. Loudermilk. Yeah.

Mr. Culvahouse. Now, the one point that I think is important to make is the Framers obviously created the House with only elected Representatives, did not empower for temporary appointments. And Brian eloquently -- but the one thing that the Framers were very clear about and the one reason that I think every lawyer who has looked at this comes down on the side of it is the majority of the whole House is the quorum, it is the Framers disliked intentionally the idea that a rump group of the House, a handful would purport to be the House of Representatives. And that is partly because there was a lot of jealousy and distrust amongst the early States. Rhode Island and Maine was afraid that the larger States would act inappropriately -- or act not in their interest, I guess, is a better way to say it.

But, you know, I remember my first job out of law school, I was working for Howard Baker on the Senate staff, and there were a number of old lions of the Senate -- and they were old lions -- who were distrust -- you know, who still didn't like the fact that Gerald Ford was going to be confirmed to be Vice President because that was inconsistent with the Framers. But it was -- you know, we are fortunate that that happened.

And I think here the most -- the least Representatives, the least Representatives' scenario that you can envision is that you have 30 House Members after a nuclear attack, or a weapons attack that purports to act as the House.

Mr. Baird. Congressman, you raise a really interesting point, and it is a difficult

challenge. Clearly, the Framers wanted there to be direct elections in the House, but they also wanted there to be representation in the House. If you have no representative at all -- what we are left with is kind of a paradoxical situation, we are saying having no representative at all is somehow better representation than having a representative chosen on your behalf temporarily by the last person you elected, which is what we propose.

Mr. Loudermilk. Right.

Mr. Baird. There is a debate about, discussion that has been said a lot, Well, you can't pass a constitutional amendment rapid. Actually, you can. There is nothing in the Constitution that says you can't. It is in the best interest of the States to ratify quickly if this body will act. Why? Because then every State is assured that even in catastrophic circumstances, they will have temporary replacement and have a voice in that Congress in the Article I branch until they can have direct elections. So we could do it quickly, we could ratify quickly, and you would have representation.

Mr. Loudermilk. One of the things that I heard discussed -- this -- I love the thinking outside the box. And we talked about that there were originally appointments made to the Senate by the State legislatures. The design of the Senate and the House were specifically different during the time. The State legislatures represented the interests of the State, and the House, the people. So it kind of eliminates that in my mind.

The other thing is the only way that I see constitutionally you could do this is -- what you are talking about is electing a vice Congressman is really kind of where you are going with it, right, sort of like the Vice President, somebody to accede to it.

Politically I can see a lot of issues with that. A lot of Members may decide to have a family member. I mean, you think of the districts out there and how polarized we are

right now, and I would double my security, you know, if there was somebody who could immediately accede to that position.

But one of the things I am looking at is I don't believe there is a silver-bullet solution to most issues, and I think this is one that a multiple approach is one to look at. And as I am looking at it is, what is -- what can we do to reduce the time that you do something temporary? If you can significantly reduce that time, then to convene a House of Representatives that is duly elected.

Georgia, the State of Georgia, has actually addressed this in code. In its current code in Georgia, basically it says if there is a vacancy of more than 100 in the Federal House of Representatives, then the Governor has to issue a special election to occur within 49 days.

So they have actually addressed this, said, look -- they want to make sure that, you know, we have representation for the State of Georgia, and that is triggered at 100, and it is only for special election if a Georgian member of the House has deceased as part of that or is incapacitated.

So if there is a way that we could get 50 States to enact a similar type -- you know, a bill and to make it law of the State, then that would significantly reduce the potential time that we have temporary.

Yes, sir.

Mr. Rogers. Mr. Loudermilk, the Continuity and Representation Act that was passed in 2004 and 2005 is Federal law and requires exactly what Georgia did, a special election in 49 days if 100 or more Members are killed.

With due respect to the States and their power, it is probably a very good idea for each State to enact their own State law because of their power on elections. But there is a Federal law that requires that.

Mr. Loudermilk. Okay. And that is good to know. I do agree with you it should be done in every State because then that prompts the State to be prepared, you know, in that event. And so --

Yes, sir.

Mr. Baird. Two very quick points. One, this Commission and prior commissions have addressed that very question of the politicization of their appointments. The better strategy, from a security and political perspective, is keep it quiet, keep it secret so that there is not some currying of favor. If people like me, they don't like A.B., but he would be my designated successor, I don't want that baggage.

Mr. Loudermilk. Right.

Mr. Baird. And I don't want A.B. to be a target as well.

The second issue is, though -- first of all, there is a real question of could we have meaningful elections in 49 days. Since that bill was passed, there have been very few special elections conducted in that time frame. But the second point is, a lot gets done in 49 days. After September 11th, this body convened. I was there. We did -- we modified FISA. We authorized the use of force in Afghanistan and elsewhere. We did a lot of stuff in 49 days.

So when you most need the Congress, you wouldn't have a Congress for a time that is just a crucial period.

Mr. Loudermilk. Right. And I agree that as -- when we do go back and compare the founding of our Nation, they weren't under the same timeline that we are now. You know, if there was going to be an attack, you had weeks to prepare for the ships to sail across the Atlantic, right? We are talking from months to minutes now. And so I understand the need to do this.

And so, like I said, it is a very intriguing conversation that we have to have. And so

thank you, Mr. Chairman.

The Chairman. Thanks.

I have got Mr. Perlmutter and then Mr. Davis.

Mr. Perlmutter. This is a really important topic and one that has all sorts of paths that he we could follow. But I am with Mr. Baird and the Commission. I just don't think we can have any lapse of time. Okay. In that instance then we have got to have something that covers us in that 49-day period and then have the elections and then, you know, move forward. But in that momentary lapse, we have got problems, especially if it has been an attack, especially if it has been, you know, where -- with things going on.

So I agree with Mr. Rogers on, you know, the quorum piece of this thing, but I don't agree with him -- I mean, I think the Constitution is flexible enough for us to be able to do a number of things. I am very concerned -- I agree with you, too, on how long it will take to do a constitutional amendment. We have got to manage this in the time -- I mean, right now.

So -- and I think rules change, but it says -- so Article I, Section 5, 5.1: Each House shall be the judge of the election returns and qualifications of its own Members and a majority of each shall constitute a quorum to do business.

So there it sort of comes back to your question about what is a quorum, but I think we -- you get then to the next section, 5.2: Each House may determine the rules of its proceedings. So where I think we have failed -- or not failed, but I think we have taken a policy that I don't think fulfills all that we want is when we say, you know, let's look at the number of people who -- and Ms. Van Dyne wants to make a distinction -- I think she is right -- between incapacitated and dead, so we have got to think about that.

But I think we need to allow -- so let's say there is 435 of us, and 435 is not a sacred number. We have had different numbers of the whole House since the beginning.

Initially, each of us represented about 30,000 people. Now we represent about 800,000 people, so that number is not sacred.

But if we start at 435 and let's say 400 people are killed, now we have 30. What's the policy? Do we just let the executive go forward, do its thing? Is Congress going to be able to function, not function?

Mr. Rogers.

Mr. Rogers. Well, thank you, sir.

I do take a little exception with one of the other witnesses here who said no constitutional scholars had found for the provisional quorum rule. Walter Dellinger who argued *Raines v. Byrd*, which is a case of constitutional standing about the line-item veto and did many other cases, he testified that the quorum rule would work under the Constitution. And the point of view of the then Parliamentarian, Charlie Johnson, and the Members I worked for and Mr. Dellinger was to have some elected Members, even if it is a small number, is better than any.

Mr. Perlmutter. I am actually agreeing with you. I just don't think it goes far enough. It doesn't fulfill the policy concerns that I am worried about.

So I think that the House had the right to change its rules. I think the Supreme Court has to respect that, but I don't think it really covers -- it then lends us to these problems of, okay, the majority just switches, you know, who is the Speaker, all that kind of stuff. And I don't think it is helpful when you get down into that nitty-gritty piece of this thing.

Now, God forbid any of this stuff happened to us. Okay. But I think -- so I am not disagreeing specifically with the rule, but I don't think the policy that ultimately comes from it is what I want to see. I want us to be able to cover the losses as quickly as possible in a way that does the least disruption to the makeup of the House, and then

provide for the elections, which you are absolutely right, that would then take place 50 or 100 days, or some appropriate amount of time thereafter.

And maybe we make sure that whoever is the designated survivor of the Member -- and this may be in your -- in the amendment that you all are proposing -- can't run for election, you know, and just cut that out, just deal with it, you know, for that momentary period.

So I just think there is enough flexibility for us to do a rule, and you did one. It didn't go as far as I would like to see it go.

Mr. Rogers. If I could just comment on that. I totally agree with you. I think that the House Rules Committee and the folks on this Select Committee and others should look at all of those rules and continuity procedures. We did what we could in the time, but then, of course, other issues came along and there has been some work over time. But, yeah, it is a very important issue, sir.

Mr. Perlmutter. The last thing I would say, because I went with the everybody-is-killed scenario, there is the question of incapacitated comes up and the definition of incapacitated. Is it a coma? Is it -- I don't know what it is. That one still has me a little bit troubled.

Mr. Baird, do you have a thought on that?

Mr. Baird. Well, the incapacity issue has been wrestled with, as you know, but it is not -- I am a neuropsychologist by trade. I have dealt with a lot of capacity --

Mr. Perlmutter. I can't -- I am not sure if your mic is --

Mr. Baird. The light seems to be on.

Mr. Perlmutter. Maybe it is just yours is a voice I can't hear.

Mr. Baird. I will bring it a little closer. Thank you. Is that better?

Mr. Perlmutter. There you go.

Mr. Baird. Thank you.

The incapacity issue is not unique, and people have wrestled with incapacity for a long time. The easiest and most eloquent solution is simply if you say you have got capacity, you have got capacity. Okay. So, in other words, somebody is not going to say, I never liked Baird anyway. He's crazy, which is a given. But they can't remove my ability to represent my constituents that way.

So if you can declare you have capacity, you should be acknowledged that. But if you can't declare that, then there should be a process with medical professionals and legal professionals to decide it. But as soon as you then can declare it, you get it back if you are ruled without capacity.

Mr. Perlmutter. The last thing I am going to say is for Mr. Bishop, because we were on the field at Gallaudet when you guys were under that attack, and we didn't have any police. We were all huddled in the dugout, you know, wondering what the heck was going on. And so, the very same things that you were -- you know, you guys were under an attack. We weren't, but we were wondering if one was coming for us.

And so, you know, we have all -- and then, obviously, we have January 6. So, you know, this isn't just hypothetical anymore.

Mr. Baird. Mr. Perlmutter, if I could address that real quickly, I'll be very brief on this.

One of the things we have not addressed, but I think is real important to recognize, in our loyalty to elections, which we all believe are important, essential, we create a condition in which without elections, people can alter the makeup of the House and Senate, and that may well be an incentive to do so.

The reality is had 20 Members of the Republican conference been killed that day when Mike and his colleagues narrowly escaped that fate, the balance of power in the

House of Representatives would have changed.

In the United States Senate with an evenly divided -- a dead-even divided majority, or minority in the Senate, one assassination, non-electoral process, can change the balance of power in the Senate, and that affects the Supreme Court for a lifetime.

So if we don't find some mechanism to disincentivize non-electoral interventions which could be by foreign terrorists or domestic, we create an incentive for mayhem, and we undermine the very principle of elections which we are saying is so sacrosanct, because through non-elective means, I could change the balance of power in the House and Senate, and that is dangerous.

The Chairman. I think Mr. Lewis wanted to chime in virtually, and then I have got Mr. Davis.

Mr. Lewis. As I see this, look, you guys are the policymakers on this, and we are sort of on the end of we will deal with whatever policy you create. But from the discussion that I am hearing here, it seems to me we need to separate two things, because it is not a question of election versus appointment or what have you. It is a question of what do we do for the emergency period before any election is possible? And I think that is what many of you are focusing in on.

But it is not -- in my mind, it is not a question of either/or. It is a question of solve the first problem first, which is the emergency situation.

The second problem of how do we do an election and when do we do an election then follows that. And remember this: After 9/11, this country was almost of one mind. It was unreal how our opinions about what things were changed and our divisiveness went away for a period of time. It didn't last forever. But for a period of time, Americans were pretty much of a single mind: We are going to do what we need to do to make this country okay.

And I think in any future disaster, you are going to see a similar reaction for a while.

The Chairman. Mr. Davis.

Mr. Davis. Thank you, Mr. Chair. Great to hear from you.

I don't know if anybody else noted, but my good friend, Mr. Perlmutter, used the word "lastly" three times, so don't -- lastly. I would like to begin my questions with Mr. Bishop.

Mr. Bishop, you don't look any better on video than you did the last time I saw you in person.

Mr. Bishop. I can't -- I knew I could just expect that from you. I will just not say anything out of respect.

Mr. Davis. Well, hey, you are a changed man if you have got respect for me, my friend.

Hey, it is great to see you. And, you know, we were together that morning on that baseball field, and you and I both share that probably as our most terrifying experience that we ever had in our lifetimes together. We ended up at the same spot at the end of the shooting, and we will forever have that bond together of experiencing that day.

And my question was going to be to you, because I didn't remember our margin of the majority back then, but Congressman Baird just mentioned that if it worked out differently, if David Bailey and Crystal Griner weren't there, it could have changed the balance of power.

I really appreciate the job that all of you are doing in putting forth proposals, and I agree that this is something that needs to be debated, but I am conflicted just based on the discussion and the testimony that I have heard here today as to what that solution is.

Mike, you were with me that day. You are somebody who I consider a very close

friend. I was not here for your opening testimony, so if you mentioned this earlier, I apologize. But what do you think is the best thing that we ought to be considering today? Because if it is the constitutional amendment, I mean, I have got a lot of other great constitutional amendments that I support, but they haven't gone anywhere in decades.

So if that is your number one choice, how realistic are we to actually be able to do something?

Mr. Bishop. Well, that is a better question for you and your colleagues as to whether or not you are in a good position to do anything and how quickly you can do it, but I guess my point being here and the point of the Commission in producing the recommendation and presenting it to Congress is that if not this, what? We all know that these issues exist. We all know of the imminent threats to our Constitution, our imminent threats to our institutions. And, you know, I think you have to take aggressive, quick action to put in place a mechanism.

And I, unfortunately, don't think it is our luxury to be able to look at the amendment process to the Constitution and say we don't support it because it is going to take too long. We just don't have that luxury. We have got to put this on the track and start it down the path as quickly as possible so that we -- you know, we have, at some point in time, a solution in place because we are sitting ducks, to use a very rudimentary expression.

We have done nothing, and we need to be -- as was said earlier, we need to be prospective in our approach and not retrospective because what happened to the Republican delegation that day, Barry Loudermilk was just there as well -- I don't know if he is still in the hearing room. He was there as well, and I think we can all agree if it can happen to us, it can happen at any time.

And we -- former Congressman Baird mentioned that we were also on that train

that crashed. Now, I don't know, maybe we are bad luck.

Mr. Davis. Yes. Yes, you are.

Mr. Bishop. Yes. You were there too.

My point is that it can happen, and you just don't know when it is going to happen. It can be a planned attack. It can be absolutely just a tragedy occurrence, but we are -- instead of taking forward action, we are frozen in our tracks because we are talking about how long it is going to take.

So the path -- the journey of 1,000 miles begins with one step.

Mr. Davis. I appreciate you bringing this up as a possible solution.

As the chair -- as the ranking member of House Administration, my concern is how -- is election administration. We have had provisions in place that were implemented before most of us got to Congress that provide for an election within 49 days, right?

The Chairman. 49 days unless there is a previously scheduled election within 75 days, and then it goes to the 75.

Mr. Davis. So election administration. Donna, great to see you again.

You mentioned mail-in ballots, you know, States like Oregon put forth. In a time of disaster and a time of war and a time of attack, I don't necessarily trust the Post Office is going to get those ballots out as effectively as they do in a time of peace.

I would argue States like Florida probably have a really good local election administrative process that could work, and I guess my goal, in the short term, is we talk about the time it may take to implement any agreed-to solution that we may have, is how do we ensure that those elections can go off without a hitch? Why aren't we replanning election administration as part of this issue too, as part of this discussion? What do we need to have in place through the Election Assistance Commission, through HAVA

investments in our States to be able to be ready for any possible short-term election process?

I mean, Alaska is going to go through an election process for a special election for our friend and former colleague, Don Young. And I have been to Alaska, and let me tell you, the election administration processes in Alaska are a lot different than any other State I see represented around this table today.

So planning for that election process, is that something you have thought of, Donna?

Ms. Shalala. Obviously, that is a key part of this. All we are trying to do is preserve the status quo. This is the most conservative approach you can have. What we are interested in is protecting the balance of power, covering the losses with the least disruption as quickly as possible. Those are the principles that we are trying to follow, and to do that, we need an election process that is quicker and fairer and perceived as fairer. But if we don't do that, we end up with small quorums without representation across the country.

So that is, obviously, a critical part. They need to do continuity of government planning as well, and Congress needs to look at the resources that are needed to keep -- to get that -- really to take advantage of technology and of other things. And I am not arguing particularly for mail-in ballots or anything else.

Mr. Davis. Right. No, I understand that.

Ms. Shalala. I am saying for the period of time. And all of us want this to be temporary so that we have representation, and we can continue the government, but we also believe in tighter elections.

Mr. Davis. I am going to make some comments lastly. I promise you, this will be the last time I use the word "lastly" in this hearing.

I think we all have the same goal. We want something in place in case of that disaster. What it is I think should be a layered approach that this committee should look at, that would include election administration, would include long-term whatever -- whatever was decided upon the best process for continuity.

But I think what makes this House special is that we don't have anyone appointed as our successors. We are the ones that have special elections. The Senate, based upon each individual State's laws, has a different process. So we have to take that into consideration constitutionally. It is what our Forefathers imagined.

Now, I do believe precedents have been set in a time of war, in a time of disaster. The executive branch, they don't need Congress now to begin a conflict of retribution and retaliation. They certainly wouldn't need it if Congress was incapacitated for a short term.

However, I am glad we are having this debate because I do believe, based upon the numbers that Congressman Baird laid out, that if there were vacancies in Illinois's 13th District, in Georgia's district, and in Michigan's district, among others, with a different outcome on June 14 of 2017, I believe the constitutional crisis would have been that we would have seen the minority in the House want to immediately become the majority.

That is something that is -- you know, I hadn't thought of until this morning. But it is something that, again, we have to prepare for. I am glad everybody is here working on this issue. I am glad we have got a great team on mod comm and the rest of the committees of jurisdiction.

And I thank each and every one of you lastly.

The Chairman. All right. I have got Ms. Van Duyne and then Ms. Scanlon.

Ms. Van Duyne. All right. And I hate following Rodney because I could never be as

short, sweet, or funny, funny as you.

So I appreciate this conversation. I think I am in a unique position being a freshmen, a freshmen who came in in the middle of a pandemic, and a freshmen who came in not ever seeing Congress as a Member, how it normally works.

You know, Ms. Shalala, you use the word "temporary" a number of times. The definition of temporary, the definition of incapacitation, and the definition of emergency I think have been redefined over the last 2 years. I look at the word "temporary" and what we have done with our temporary response to the pandemic, which I appreciate you bringing up, because it is the first time that we have actually brought up the context in which we are having this conversation, the use of proxy voting, the use of remote meetings.

I have been here for almost 15 months. There are Members of this body I have yet to meet. There are Members of this body that do not have open offices for constituents to come into because we are still in an emergency, we are still handling this in a temporary fashion, and it has been over 2 years.

So I would ask what is the problem right here that we are trying to solve? I think right now if it is in a pandemic situation and it is temporary, these solutions that we are discussing I think are way too broad, and have already shown an opportunity to be completely misused.

I also start thinking about the history of our country, where we came from, the pandemics that we have had, the natural disasters that we have had, the wars that we have had at home and abroad, and how we were able to come and do our job. We were able to come and have conversations, meet in committees, be right down the street and talk to one another, and how difficult that has been in the last 2 years.

And yet, our Forefathers were able to get here without such, you know, comforts

as planes and, you know, phenomenal car systems and highway systems. We were able to do that then.

And I understand that the threats upon this country and upon this body have definitely changed, but I am also concerned about the lack of transparency and having -- you know, keeping in secret who your Representative is going to be to me is problematic. I think when we pick one person to be our replacement, you know, the fact that we have got a 50 percent divorce rate shows that sometimes the person that we pick isn't exactly the person that we think they are going to be.

And I understand these are short term, but, again, short term and temporary have absolutely changed. We have redefined that in the last 2 years.

Mr. Culvahouse, there is definitely still distrust. I live in the State of Texas, and, you know, we have a saying right now because we see so many different transfers coming from one particular State, Don't California my Texas. That is still happening today. We have not been able to move beyond that.

But I would bring to the attention of this committee that we are looking at a number of different recommendations from the board; the first being a mass amount of casualties such that we don't reach a quorum. And I think there are a number of ways that we could, in a temporary position, be able to solve that. And I understand 49 days is the issue, right? I mean, is that what this board is saying? Because this is what all the temporary -- and temporary is being defined as 49 days or, in the case that you have got another election already scheduled for 75 days less, then it would be that. Is that the issue we are having is the 49 days is why we are here today?

Mr. Culvahouse. I will go first. No, I don't think so because, I mean, 49 days is a long time in a crisis, right? As Brian talked about all of the things we are doing in the aftermath of 9/11, let's imagine a scenario: You have a nuclear attack, and you have an

acting President who may not even be a Cabinet member, who may not even be a Cabinet member, and you have a rump group of -- and you have a fewer than -- you have, you know, 100 Members of the House surviving, and you have an acting President who wants to surrender the Navy to the Chinese. I am really doing a Tom Clancy kind of thing.

You would expect and hope that the House and the Senate would impeach that President, but that President -- and I am doing a lawyer's unimaginable horribles thing, Congresswoman. But having been a White House counsel, that acting President's White House counsel would say there is no House, There is no House. It doesn't have a majority.

Ms. Van Duyne. And to your point --

Mr. Culvahouse. And you may not even have a Supreme Court. And so, it is -- I think time is of the essence, and that is why -- I don't think -- our Commission would suggest there should not be any interregnum where there is not a functioning House of Representatives. We believe there should always be a functioning House of Representatives and a functioning Senate.

Ms. Van Duyne. Let me ask, Mr. Rogers, I know that you also had your --

Ms. Shalala. Yeah, let me just add onto that.

We are distinguishing between a pandemic where people are still alive, and if there is a problem with proxy voting, I happen to think when I was here that there was a problem with the proxy voting. We tested it out. We clearly needed to tighten up on that. But there is a distinction between a pandemic and when Members of Congress are actually dead, and their areas don't have representation. That is where we are recommending temporary until there are elections.

Ms. Van Duyne. Okay. Because I am looking at recommendation 2 that says: Amend the Constitution to authorize that the House and the Senate shall each have the

power to provide for emergency procedures, whereby the bodies would allow remote forms of attendance and participation in the businesses of either the House or Congress subject to the restrictions that, and it gives a number.

So basically I am reading this -- and maybe I am misunderstanding, but I am reading this to say we are going to have proxy voting and Zoom meetings constitutionally available at all times.

Mr. Baird. That is not the intent.

Ms. Van Duyne. Okay.

Mr. Baird. The issue is, imagine the House and Senate have adjourned for August recess. You are back in your district. Vladimir Putin says, I am fed up with how things are going in Ukraine. And if you guys intervene in any further way, if you don't stop all arm shipments, I will nuke the Capitol. It might be --

Ms. Van Duyne. That is one scenario, but I am also reading into it saying that you are, you know, established by being physically unable. I would argue that there were a number of Members in this body that have said that they are physically unable to be here. And we are allowing each Member to define whether or not, for them, they are able to be here or not, whether or not they consider themselves temporarily incapacitated and immediately can come back when they want.

Mr. Baird. With respect, Congresswoman, that is not in the proposal. What is in the proposal is that there may -- what we don't want to do is say that you must be physically present in order to be deemed to have capacity because there may be situations where we cannot convene in person. And we need to have mechanisms, i.e. potentially remote voting to deal with that, because there may be situations where it is not allowed.

Capacity means your rational ability to make decisions. That is what capacity in

the legal context means. I mean, that was my background was neuropsychology. That is what that capacity means. But if I am laid up because I am having a baby or because I have got cancer and I am getting treatment, I am not incapacitated under any stretch of the law, and my constituents should not lose the representation.

Let me just take it to Texas for just a second.

Imagine that a flight of the Texas delegation is going back home to Texas, and tragedy strikes, or there is a meeting of the Texas -- Republican or Democratic parties, and somebody takes that out. You could lose the representation of the great State of Texas in the House of Representatives for a protracted period of time.

What we are trying to say is we want to protect Texans' right to have representation in the Congress. That is what we are saying, as Secretary Shalala was pointing out.

Ms. Van Duyne. Okay. So I am looking at the Commission's report, and maybe I would just ask that you look at recommendation 2, because I just read directly from it. So I am not making the words up. But, I mean, when I read things like physically unable, it does not say mentally incapacitated. It does not say lacks the mental capacity. It says physically unable.

It says that, you know, modes of voting and participation must be open to Members, meaning it is their choice, correct?

Mr. Baird. Well, the point is that they have an opportunity to vote if they are not able to be here in person. That could be because it is not safe to do so. It could be because --

Ms. Van Duyne. Which I would argue could be extended to include what we have seen over the last 2 years where some people say it is not safe to be here.

Mr. Baird. Well, with respect, Congresswoman. I understand, I am not a fan of

proxy voting myself. I would prefer direct remote voting, and there is technologies in countries that do it. We had extensive testimony by David Petraeus, former head of the CIA, former general and commanding in Iraq and Afghanistan. He managed those wars remotely and gave excellent testimony in a remote hearing we held.

It is plausible to do that, but the key issue here is if you don't provide some mechanism for that to happen in times of crisis -- and we can argue about the day-to-day vicissitudes of that. If you don't provide that, you are essentially potentially abdicating the Article I, Article I branch responsibilities and authorities. We think that is a mistake.

Ms. Van Duyne. And I think that is the issue that I am having a hard time describing -- a hard time on coming to terms with because I think we are on a slippery slope. I think if your -- the doomsday scenarios that you are bringing up, I think are very valid, and I think those are ones that we need to consider moving forward.

My concern is that the recommendations, as I read them, and as I have seen put into play the last 2 years, it is a slippery slope that we are going down, what necessitates these procedures coming in, what necessities an emergency, what is defined, you know, by temporary?

And, Mr. Rogers, I know that you have comments as well.

Mr. Rogers. Thank you.

I was just going to say you really went at something that the Members of Congress looked at back 17 years ago and 18 years ago when I was working on these issues, the balance between expediency and legitimacy. And those Members came out and the House majorities ended up voting on legitimacy over expediency.

And that really kind of goes to the foundational part of the government. Do you want to have people come in that are selected by the Members themselves without any voting, without any imprimatur of the states, without any imprimatur of the people, the

American people themselves to populate the people's House for 49 days, or whatever it is, but taking all those great actions that the gentleman at my left talked about would have to happen in 49 days? That was the concern, because it was certainly talked about. The constitutional amendment was back on the table back then, as it is now, but the Members decided, even though it maybe creates a situation, we have got to go with legitimacy because ultimately, we are talking about the people having faith in what's happening.

Thank you.

Mr. Baird. But the definition of legitimacy has been defined that somehow, five Member survivors are more legitimate than 435 temporary replacements chosen by the people who were last elected by the voters.

I don't possibly see how a micro quorum with lack of representation from many States and many districts has more legitimacy than a temporary appointment until such time as special elections can be held. I don't see how that it is more legitimate.

Mr. Rogers. And if I could just answer that. The Constitution says that the Members be chosen by the people. It doesn't say that they will be chosen by their predecessors.

So, yes, you could have a micro quorum for a short period of time. Some of the testimony and talks that we had at the time suggested that people probably wouldn't be incapacitated for that long of a period of time; the idea that most of the things that incapacitate you either kill you or you get better relatively quickly.

The House rules, as Mr. Timmons was asking about earlier, if you die, you drop out of the quorum. It has been the rule now. And so, when people are concerned about the provisional quorum, perhaps they should be concerned about the House rule that when a person dies or resigns or -- death, resignation, expulsion, disqualification, removal, or

swearing, meaning swearing in, the whole Member of the House should be adjusted accordingly, which is clause 6 of -- clause 5(d) of Rule XX. I say clause 6. The (d) and the 6 got juxtaposed in my head.

I think it is more legitimate to look at where the House has been. It has been there for a long time. This precedent, now codified, goes back to Deshler's precedence in chapter IX. So for a long time, when there has been a resignation or a death, the whole Member of the House adjusts and the quorum -- and you guys see that. When you have had someone who has, you know, resigned or otherwise, you may not notice it, but the whole House number does change, and the quorum does actually change.

RPTR MOLNAR

EDTR ZAMORA

[10:59 a.m.]

Ms. Shalala. But the problem we are talking about is that that is for incremental Members -- individual Members that may die or be incapacitated. What happens if a much larger number, and you end up with 10 Members of the House of one party? That is what our report speaks to.

Mr. Rogers. And if I might, so we asked that question of Walter Dellenger, who -- his take really resonated with the Members that ended up voting for the quorum rule, was, it is better to have some House than no House at all, that has been elected by the people.

Mr. Culvahouse. Walter Dellenger was a law partner of mine, a friend of mine. I recruited him to the firm. I have great respect for him.

What we were talking about here, and with all respect to precedent and what -- we are recommending a constitutional amendment. If that amendment is passed, by definition, then it is constitutional. By definition, it is constitutional.

And the reason we are recommending constitutional amendment is, as my colleague said, we didn't come to that. I am a conservative. I didn't -- you know, I started out late. I am not in the business of recommending amendments to the Constitution, as our predecessor commission did.

But all of this came around to the fact that we have got a problem, and the problem is a majority of the whole House is a quorum. And in a nuclear catastrophe, the most obvious, but others -- anthrax, whatever, chemical, dirty bomb -- you could have a nonfunctioning House at a time when the Nation most needs -- most needs a functioning House.

Congresswoman, the proxy voting, whatever, it really goes to facilitating a functioning House in a catastrophic circumstance. And we just think that if you are going to amend the Constitution, it would be nice to make it clear that the House has the rules, in emergency circumstances, or has the authority to authorize something other than requiring people to show up.

But our preference is people assemble in Washington. Our preference is they -- our preference is that these temporary appointees be temporary.

The Chairman. Followup from Mr. Timmons and then Ms. Scanlon.

Ms. Scanlon. Thank you very much.

Mr. Timmons. Mr. Rogers, the unlikely situation of everyone being present at the State of the Union, all 435 Members, everybody dies, what happens?

Mr. Rogers. Well, anecdotally, without knowing for sure, but when I was working for the minority leader and Speaker Boehner when he was Speaker, there were Members who were asked not to attend. And one of those Members told me he was asked to not attend -- I don't know if that is an official policy or not. That is beyond the ambit of my knowledge. And certainly the designated survivor in the line of succession, and I believe sometimes you have Supreme Court justices who don't come for whatever reason.

So it is possible you could have a very thin amount of legitimately elected or confirmed people to act. In the absence of that, there is the idea I was mentioning earlier about continuity officers that are chosen as officers rather than Members temporarily, or you would have to do something else like the constitutional amendment.

The Chairman. All right. Ms. Scanlon.

Ms. Scanlon. Thank you. Thank you very much, Mr. Kilmer for having this important and I think long overdue hearing.

I am heartened by the fact that we do seem to have widespread agreement about

some things that are not without controversy. One is that Congress should continue. The second is that we should have elected representatives in it and running the government.

But, you know, in the last 20 years and in the last 4 or 5 years, certainly we have seen physical attacks on substantial numbers of Members of Congress, whether it was 9/11, whether it was the June 17 attack on the baseball team, baseball field, or January 6th, any which could have either decimated Congress or changed -- significantly changed the balance of power. So physical attack is one thing we need to be concerned with.

Plague, and we certainly have been dealing with one of those. And, you know, as a member of the Rules Committee, and while I believe firmly that the Rules Committee is all powerful, as I am sure our former member, Ms. Shalala, does, I mean, there were challenges to trying to address an ongoing pandemic when we did not have vaccines yet and how we were going to keep Members safe when we had a change of Congress, and the rules that had permitted certain protective measures didn't exist anymore because it was a new Congress. So having something that can bridge Congresses and recess periods and that kind of thing seems more important than ever.

And then there is the cyber or other forms of attack. I mean, we have talked a little bit about, you know, a nuclear bomb taking out D.C. But what about taking down the air traffic control system? I mean, then we end up with a system where people can't gather or at least not for a significant period of time.

So all of these things, I think, are things we have to be concerned about. And I appreciate your trying to grapple with the constitutional, electoral, and other issues that we are dealing with here.

Mr. Lewis, I am so appreciative of the work that our election officials do across the country, across the political spectrum, and it is so important. I just wanted to quickly

address a couple election administration issues.

You mentioned the paper that is used for ballots -- paper ballots, that that could be a possible, sounds like a supply chain issue for quick elections. Was that what you were suggesting? That was right as I came in.

Mr. Lewis. Well, ballot stock is a very specific stock that we order from printers, and we order it well in advance of a scheduled election, so that we have to rely on the vendors to get with the manufacturers to produce the correct number of ballot stock that we can use in any given election. Obviously, in an emergency situation, we may not have that luxury and probably wouldn't have that luxury.

The reason we go to such extraordinary lengths is to control so that we know that somebody didn't just slip in a ballot somewhere. By using ballot stock, we number it, we account for it, we count it, we know how many we received, how many we printed, how many were voted, how many were spoiled, and how many we have left. And that assures us of, then, that we didn't have manipulation of the outcome.

In an emergency, we may not be able to make any of that work. And so if we are going to have to vote on, for instance, plain paper, then we have got special considerations. We got to figure out how do we do a work around to make sure that the numbers that come up are the numbers that really are entitled to come up.

Ms. Scanlon. And that certainly goes to a preplanning kind of consideration that I think Secretary Shalala was mentioning, that that is something that if we know what we have to plan for, then we can plan for it.

I appreciate your talking about the integrity of the ballot stock. It has certainly been on people's minds in Pennsylvania and, you know, it has been useful to explain to people that Vladimir Putin can't just run off copies of ballots at FedEx or Kinko's and slip them in there without someone noticing. And in Pennsylvania in particular, we have 67

different counties that each order their own stock. So it is very, very difficult to mess with a Pennsylvania election.

Just one other question about the resiliency and what we might have to do with election administration in an emergency election. I think, I am sorry Mr. Davis had to leave, but he talked about not being sure that mail-in ballots would work because maybe the post office wouldn't be working.

But our State election officials have experience now with drop boxes and other forms of allowing people to submit their ballots other than the post office or the polling place, don't they?

Mr. Lewis. Well, yes, assuming that -- I think even in my testimony I mentioned, you know, if the post office doesn't work, if there is something that prevents them from working, we obviously are not then going to have mail as an option. So how do you come around and work around that?

If mail is an option, it then becomes an option that we can use and simplify the election for some folks. Admittedly, we still have to recognize most of the country does not have extensive experience in mail balloting, but we can always make that work.

This is -- look, elections officials are incredibly resilient. They are going to figure out whatever we got to do to make something happen. The problem is whether or not that then has legitimacy in terms of the way the public interprets what we did. And that certainly is where we are at this point.

Ms. Scanlon. Sure. And having systems -- known systems in place that people understand and don't appear to be under attack after the fact seems very important.

Mr. Lewis. Just let me add one thing there. The problem for us as elections administrators all around the country is maybe 25 percent of the jurisdictions are as well funded as any other part of government, but that means 75 percent aren't. And so

having resources to buy spares that you may use at some point in the next 20 years is not something that our jurisdictions are going to have enough money to do. And so it is one of those where we sort of have to say, you have got an emergency, we have to have emergency reaction, and that may or may not be possible.

Ms. Scanlon. Okay. Just turning to the similar issue of the legitimacy and such in assuring that any temporary replacement Members of the House have that legitimacy, much conversation. Can we elaborate a little bit, maybe starting with my colleague, Rep. Shalala, on sort of the criteria for who might be on these designated replacement lists, and has consideration been given -- I think we talked about former Members or people who are already elected officials to address this issue of public buy-in.

Ms. Shalala. No. We didn't -- while we had a discussion about what they would look like, we didn't add that amount of detail. Just, we trusted the Member of Congress to designate a list, perhaps, of people they thought were qualified, assuming in their own party, so that we wouldn't change the political mix maybe.

Ms. Scanlon. Anyone else want to comment there on -- yeah.

Mr. Culvahouse. Yeah. We talked -- I will go to Brian quickly. I mean, we talked about such things as making it clear that they would be disqualified for standing for election. So, I mean, the confidence of the electorate and the government that there is -- you know, that this isn't a way to, you know, to leave a legacy by will for your successor, to mandate your successor. We went back and forth over whether it should be public or private. So we just didn't -- we left it silent with the notion that, you know, that the Congress and the drafters of the amendment are the best people to do it.

Brian?

Mr. Baird. Congresswoman, a couple quick points. One, unfortunately, I don't think there is agreement on this in the testimony today or even some of your colleagues

that we do believe in continuity of the Congress. Because if we don't have a Congress for 49 days -- and by the way, I should say, parenthetically, since that law was passed, there have been very, very few elections under normal circumstances in 49 days, let alone a national crisis.

And we would like to believe our enemies will play by the rule. They will only attack Washington, D.C. and only while we are -- no, our enemies are going to attack us in multiple locations, rendering 49 days improbable and impractical. So there may not be agreement that we all favor continuity of the Congress.

One other really quick note, Mr. Chair, because I really want it to get into the record. The gentlelady from Texas who left, and I am sorry she did -- Texas has on its books a law providing for temporary replacement from members of the designated members from their legislature. So Texas has in place already the very kind of mechanism that this commission has recommended. And so I would urge that the Texas government somehow needs to look at that and say, well, it works for us actually pretty well at the State.

The Chairman. I really appreciate -- and I appreciate the final point, because I think your report said the average special election is, on average, about 150 days, so --

Go ahead, Mr. Rogers, and then we got to wrap. I am unfortunately going to have to set the land speed record to Rayburn.

Mr. Rogers. Thank you. I will be quick.

First of all, during the look at the special elections law at that time, 10 States had less than or approximately 45 days. And during the consideration, the minority wished to have 75 days in the first Congress, which was voted down. And then 60 days was voted down the next time.

And I would respectfully disagree with Mr. Baird. I think during a national crisis,

we will be able to focus quite a bit more because it will be the most important thing going on, and we will get it done in much less time.

Thank you.

The Chairman. I want to thank all of our witnesses for their testimony today. I would like to thank our committee members, as well as Representatives Scanlon and Loudermilk who joined us today. I want to thank our committee staff for putting together, I think, a terrific hearing.

You get a sense of why we decided not to limit members to 5-minute questions because this is complicated stuff. And I think it is actually worthwhile for members to be able to pull on some of these threads.

I also want to thank our stenographers for taking record of the events of the day.

Without objection, all members will have 5 legislative days within which to submit additional written questions for the witnesses to the chair which will be forwarded to the witnesses for their response. I ask our witnesses to please respond as promptly as you are able.

Without objection, all members will have 5 legislative days within which to submit extraneous materials to the chair for inclusion into the record.

Again, I want to thank our terrific witnesses. I can't help but notice Norm Ornstein in the crowd. Seems like this would make for a very good Oxford-style debate, by the way. I know that you are the father of that idea.

I think this is a really important conversation, and I appreciate each of you being a part of it. And I am sorry that I am going to sprint out of the room and not be able to thank you personally, but please accept my gratitude.

And, with that, this hearing is adjourned. Thanks everybody.

[Whereupon, at 11:15 a.m., the committee was adjourned.]

